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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1282

SAMUEL RATNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI

Petitioner, SAMUEL RATNER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 25, 1974, and said Court's denial of a Petition for Rehearing, dated March 13, 1975.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Texas is unreported.

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A, infra, pp. A-1 to A-6), has not yet been officially reported.

The memorandum denial of a Petition for Rehearing by the Court of Appeals for the Fifth Circuit (Appendix A, infra, pp. A-7 to A-8), is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on October 25, 1974, and on March 13, 1975, said Court entered its order denying a Petition for Rehearing. Copies of said judgment of affirmance and order are appended to this petition in Appendix A.

The jurisdiction of the District Court was based on 28 U.S.C. §3231.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1245(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a review, independent of the trial court's findings, of the constitutional question of obscenity is mandated.

2. Whether the materials found by the trial court to be obscene, when reviewed in the light of previous constitutionally protected materials, are in fact not obscene.

3. Whether the Government should have been required to present expert testimony as to the existence of obscenity, the failure of which constitutes reversible error.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

1. Amendment I, of the Constitution of the United States, which provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Amendment XIV, Section 1, of the Constitution of the United States, which provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Title 28, United States Code, Section 1245(1), provides:

"By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

4. Title 28, United States Code, Section 3231, provides:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

STATEMENT OF THE CASE

On April 22, 1971, before the Honorable Leo Brewster, United States District Judge, proceedings in CR-4-773 started in the United States District Court for the Northern District of Texas, such proceedings being a trial before a jury in which the United States Government brought charges against Samuel Ratner, Albert

Ratner and Wyngate & Bevins, Inc. The charges alleged violations of Title 18, United States Code, Section 1461, and an eight count indictment was returned against the said petitioner and the other defendants. These indictments charged said petitioner and the other defendants with knowingly causing the mails to be used for the mailing and carriage in the mails and knowingly causing to be delivered to various individuals by mail certain obscene, lewd, lascivious, indecent, and filthy magazines and movies and certain circulars containing advertisements giving information where, how, from whom, any by what means certain obscene, lewd, lascivious, indecent, and filthy magazines, movies and books might be obtained.

At the commencement of the trial, the Government moved for dismissal of Count 3, which motion was granted over the objection of the defense. All defendants pleaded "Not Guilty" to the remaining seven counts of the indictment.

The Government's case consisted of various individual witnesses' testimony as to the receipt of certain materials

allegedly mailed by the defendants. A Postal Inspector testified to investigating the operations of the corporate defendant and, that under an assumed name he had ordered certain materials therefrom and received same through the mails as alleged in Counts 2, 4, and 8 of the indictment.

A shipping clerk for the corporate defendant then testified for the Government that he was familiar with some of the materials referred to in the indictment; that he had stuffed envelopes with circulars advertising sexual materials; that he had boxed the materials to send to customers; and that he had actually mailed these same materials. There was no testimony or evidence offered by the Government that the materials the clerk had dealt with were in fact obscene.

The Government's final witness, a Mrs. Tierstein, testified that the names for the mailing lists were taken either from an order or from an inquiry. She further testified that an "order" was an actual order blank that was sent in requesting the purchase of material, and

that an "inquiry" is a writing wherein a person writes to the corporate defendant requesting brochures and advertisements on the materials and how to obtain them. Mrs. Tierstein further testified that once an individual sent in an "order" or "inquiry" their name was placed on the business mailing list and that no one received any type of mail-out unless their name was on the aforementioned business mailing list and that the only way they got on the list was by placing the "order" or "inquiry". Moreover, Mrs. Tierstein stated that she had never seen anyone from the corporate defendant make out an unsolicited mailing list. The Government then rested their case without having put on any evidence, or without ever asking one question relating to evidence of obscenity, as to the basic elements on the issue of obscenity as such issue relates to the materials alleged to be obscene, or the circulars which advertised how to obtain the materials alleged to be obscene, in each count of the indictment.

At the close of the evidence on behalf of the Government, the defendants timely

moved for Motion for Acquittal, pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. The defendants' evidence offered in support of, and for the limited purpose of, their Motion for Acquittal, was allowed into evidence without any objection to the introduction of such evidence by the Government. This evidence, offered out of the presence of the jury, consisted of such things as, (a) the introduction into evidence of multitudes of press materials similar to or more graphic than those involved in the instant case which have had a prior judicial determination, either by the Supreme Court of the United States or by a Court of lesser jurisdiction, that the said materials are not obscene as a matter of law; (b) the testimony of Postal Inspectors Marsh and Schoof which showed that, in relation to the issue of "contemporary community standards", press materials similar to, and more graphic than, those involved in the instant prosecution were in mass circulation by the millions through the use of the mails and by distribution through hundreds of book

stores located in each and every major city in which they had been; and that some press materials had second-class mailing permits from the United States Post Office even though they were more graphic than the materials involved in the instant case; and (c) the testimony of an "expert witness", Preston Floyd Kirk, a United Press International reporter who had been assigned the task of writing an article for U.P.I. regarding a state-wide survey on pornography and obscenity in Texas, and that, based on the results of this survey, the materials involved in the instant case did not go beyond the "customary community standards" of those press materials already available on the "open market" in, and throughout, the State of Texas. The Motion for Acquittal was then denied by the Court. The jury subsequently returned a verdict of guilty as charged in the indictment, against all three defendants, and sentence was imposed by the Court, from which sentence and subsequent affirmance on appeal, the petitioner, SAMUEL RATNER, herein seeks review by this Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. THE COURT OF APPEALS FAILED, DESPITE THE MANDATE OF THE SUPREME COURT IN MILLER v. CALIFORNIA (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419, AND JENKINS v. GEORGIA (1974) 418 U.S. 153, 94 S.Ct. 2750, ___ L.Ed.2d ___, TO MAKE A REVIEW, INDEPENDENT OF THE TRIAL COURT'S FINDINGS, OF THE CONSTITUTIONAL QUESTION OF WHETHER THE SUBJECT MATERIALS WERE OBSCENE.

The Court of Appeals' decision, although clearly addressing itself to the defendants' contentions that (1) the prosecution must introduce expert testimony to enable the jury to determine the obscenity of the material in question, (2) evidence of pandering may not be admitted into evidence to show the obscenity of the materials in question where pandering has not been charged in the indictment and (3) mere knowledge of the character of the materials mailed, without knowledge that they are obscene, does not satisfy the constitutional and statutory requirements of scienter, inadequately approached

defendants' argument that "[I]t is the duty of each court to whom the issue is presented to make its own independent constitutional judgment with respect to the obscenity of the materials in question." (Opening Brief on Appeal, p. 26).

The only statement made by the Court of Appeals with respect to the obscenity vel non of the materials in question was:

> "We have examined the record and exhibits and find that the jury could reasonably find, as it did, that the materials were obscene under the Memoirs standard." (decision p. 591).

The Supreme Court, in a concurring opinion in Jenkins, supra, stated at p. 2756:

> "After the court's decision today, there can be no doubt that Miller requires appellate courts -- including this Court -- to review independently the constitutional fact of obscenity."

The Supreme Court arrived at this particular determination after a detailed analysis made in response to the appellee's (Georgia) contention that "under Miller the obscenity vel non of the film 'Carnal Knowledge' was a question for the jury, and that the jury having resolved the question against appellant, AND THERE BEING SOME EVIDENCE TO SUPPORT ITS FINDINGS (emphasis added), the judgment of conviction should be affirmed." (94 S.Ct. at p. 2754).

The Supreme Court's response was a total disagreement with the state court's conclusion that the jury's verdict precluded all further appellate review of the claim of constitutional protection under the First and Fourteenth Amendments. Furthermore, the Court stated that even though the existence of Miller factors are "essentially questions of fact, it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is 'patently offensive'." (94 S.Ct. at p. 2755).

For the Court of Appeals in the case at bar to find simply that "the jury

could reasonably find, . . . that the materials were obscene" is tantamount to vesting a prohibited "unbridled discretion" within the trial jury. It was incumbent upon the Court of Appeals to make a full and fair review of its own -- wholly irrespective of the trial court's findings -- of the constitutional question of whether the subject materials were obscene.

2. A REVIEW OF THE SUBJECT MATERIALS IN THE LIGHT OF PREVIOUS CONSTITUTIONALLY PROTECTED MATERIALS SHOULD HAVE BEEN CONDUCTED, WITH A CONSEQUENT FINDING THAT THE FORMER ARE NOT OBSCENE.

Inasmuch as the Court of Appeals failed to independently review the question of obscenity, it also did not discuss the argument of defendants that "[T]he materials involved in the instant case are not obscene or unlawful when compared with materials held to be protected under the First Amendment guarantees in similar cases applying the proper constitutional standards." (Opening Brief, p. 14).

Defendants' Opening Brief presented to the Court of Appeals some twenty-five (25) previously-decided Supreme Court cases wherein specified allegedly obscene materials were found not to be proscribable under 18 U.S.C. §1461. A careful comparative examination of the subject materials in the case at bar with the aforesaid "non-obscene" matter logically requires a finding of an absence of criminality. Due to the voluminousness of defendants' argument presented in said brief, this Court is requested to review defendants' Opening Brief with respect to this particular argument.

3. THE GOVERNMENT MUST, IN ORDER TO MEET ITS BURDEN OF PROOF IN PROVING THE EXISTENCE OF OBSCENITY, PRESENT EXPERT TESTIMONY, THE FAILURE OF WHICH HEREIN IS REVERSIBLE ERROR.

In the case of United States of America v. Riedel, an opinion delivered on October 7, 1971, in the United States District Court for the Central District of California, the Honorable Harry Pregerson presiding, Number 5845-Crim., the

Court held that although the materials involved in that case were hard-core pornography and although the Judge would have personally held the material to be obscene, the Judge granted a Motion for Acquittal based on the fact that there had been no expert testimony to establish the elements of obscenity. As Judge Pregerson noted in his transcript, by the following quote:

> "I haven't even seen an 'X' rated movie. I occasionally may look at a Playboy magazine, but it might be in a barbershop, and that's a rare situation.
>
> So though I personally would find that pamphlet to be obscene, my personal feelings are not to govern in this area which is an important area, because we are running into the Bill of Rights, the First Amendment, freedom of expression. It is a very, very difficult area, and I know today that you can walk down the street into one of these adult book stores and buy all kinds of

> publications that are being sold. So I don't feel that I am any judge of what is acceptable in the community today, and the Government has put on no expert testimony, though the Government was certainly put on notice that this would be required."

Thus, in Riedel, supra, the Court held that a Motion for Acquittal should have been granted since the Government had put on no expert testimony concerning the elements of obscenity and the Government had been put on notice that this type of evidence would be required. Judge Pregerson, in expressing his humility, admits that Judges are not experts, and by simple logic, neither are jurors experts, in the area of obscenity. It is a matter of common knowledge and one that the Court can take judicial notice of, that in every major city in the United States, bookstores and magazine shops have these materials available in large quantities, going into millions of copies sold and distributed. It should be absolutely incumbent upon the Government that they prove all

the elements of the obscenity offense, before they can prosecute and effect censorship.

The requirement of putting on an expert would certainly relieve this Court of the countless appeals and petitions the defendants of which, as in Jenkins, supra, should never have been convicted in the first instance. The absurd result at the trial involving the movie "Carnal Knowledge" is indicative of the problem which would easily be remedied by imposing a requirement of expert testimony on the issue of obscenity.

It is most respectfully suggested that the instant case must also be reversed by reason of the utter failure of the prosecution to offer any evidence whatsoever on the various elements of obscenity, to-wit, that the material appeals to prurient interests; that the materials were patently offensive because they went substantially beyond the limits of candor in the description of sex or nudity, and thirdly, whether the materials were utterly without redeeming social value. It is no answer to say that if

the defendant puts on proof of the elements of obscenity that the Government need not do so. This is a shifting of the burden of proof which must rest with the Government throughout. In fact, it is misnomer in the sense that the defendant, should he elect to put on any proof at all which he does not have to do under the guarantees of the United States Constitution, is not putting on proof as to the elements of obscenity but is putting on proof as to the elements of non-obscenity; therefore, the jury cannot as a matter of law, ignore this quantum of proof as to non-obscenity and completely disregard any evidence offered on behalf of the defendant in order to prove up non-obscenity and rule that the materials involved are in fact obscene. In the instant case, it must be pointed out that the Government did not offer even a scintilla of evidence as to any of the elements of obscenity; but rather, they merely offered the books into evidence. Thus, it is apparent from the foregoing authorities that the conviction of the petitioner, SAMUEL RATNER, should be

reversed because the Government failed to meet its burden of proof in proving up all three elements of obscenity which is required by the law and the Constitution of the United States. It must be pointed out that in the instant case, the Government put on absolutely no proof at all concerning the elements of obscenity, thus, the decision must be reversed as a matter of law.

CONCLUSION

The case at bar clearly presents a situation where the Court of Appeals was required to do more than merely make cursory observation of the jury's finding respecting obscenity. Jenkins and Miller, both supra, bring to light the importance of checking an otherwise "unbridled discretion"; this Court ought continue in this appropriate Constitutional safeguard.

Based on the foregoing, petitioner respectfully submits that writ of certiorari should be granted in this case.

Respectfully submitted,
JULIUS A. DIX
Attorney for Petitioner

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Samuel RATNER, Albert Ratner, and Wyngate & Bevins, Inc., Defendants-Appellants.

No. 71–2062.

United States Court of Appeals,
Fifth Circuit.

Oct. 25, 1974.

Defendants were convicted before the United States District Court for the Northern District of Texas, Leo Brewster, J., of violating federal obscenity statute and they appealed. The Court of Appeals held that record and exhibits sustained determination that materials in question were obscene under the "Memoirs" standard; that there was no substantial probability that application of "Miller" standard would have materially affected jury's deliberation; and that alleged variance between allegations made in one count and proof did not rise to level of plain error and, therefore, whether there was variance or whether it was material would not be considered for first time on appeal.

Affirmed.

1. Obscenity ⇐17

Prosecution need not introduce expert testimony to enable jury to determine obscenity of material in question. 18 U.S.C.A. § 1461.

2. Obscenity ⇐16

Evidence of pandering is admissible to show obscenity even if pandering has not been charged in indictment. 18 U.S.C.A. § 1461.

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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

3. Post Office ⇐31(3)

Mere knowledge of character of materials mailed, without knowledge that they are obscene, may satisfy requirement of scienter in obscenity prosecutions. 18 U.S.C.A. § 1461.

4. Post Office ⇐49(9)

Advertising material mailed by defendants in connection with operation of large-scale mail order business which sold allegedly obscene magazines and films was sufficiently lurid to permit jury to infer that such advertising material pandered to the prurient interest of recipients. 18 U.S.C.A. § 1461.

5. Post Office ⇐49(9)

Record and exhibits sustained determination that magazines and films sold by defendants' mail order business were obscene under "Memoirs" standard in effect at time of trial. 18 U.S.C.A. § 1461.

6. Criminal Law ⇐1181

Formulation by United States Supreme Court of new obscenity test while defendants' appeal from conviction of violating federal obscenity statutes was pending did not require remand for reconsideration of whether materials were obscene under the new standard absent substantial probability that defendants would have fared better had they been tried under the new standard. 18 U.S.C.A. § 1461.

7. Post Office ⇐50

Instruction authorizing application of standards of national community in obscenity case did not materially affect jury's deliberations and did not require that case be remanded for determination under standards of local community. 18 U.S.C.A. § 1461.

8. Criminal Law ⇐1032(7)

Alleged variance between allegations of one count asserted in federal obscenity prosecution and proof offered at trial did not rise to the level of plain error and, therefore, whether variance existed or, if there was variance, whether it was

material, would not be considered for first time on appeal. 18 U.S.C.A. § 1461; Fed.Rules Crim.Proc. rule 51, 18 U.S.C.A.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

The individual defendants, Samuel and Albert Ratner, ran a large scale mail order business in allegedly obscene magazines and films. They operated through a California corporation, Wyngate & Bevins, Inc. The corporation mailed sexually explicit advertisements to persons on various mailing lists who had not solicited the material, mailed similar advertisements with each order, and advertised in various magazines. The United States indicted the two Ratners and Wyngate & Bevins for violations of the federal obscenity statute, 18 U.S.C. § 1461. A jury found the defendants guilty. The trial court sentenced the individual defendants to five years imprisonment on each of seven counts, the sentences to run concurrently. The court fined Wyngate & Bevins $35,000, $5,000 for each count. All the defendants appeal. We affirm.

We withheld decision of this appeal pending the progress through the courts of another obscenity case, in which some of the issues were identical and some related to those raised by the appellants here. That case was United States v. Groner, 5 Cir. 1972, 475 F.2d 550, rev'd en banc, 1973, 479 F.2d 577, vacated, 414 U.S. 969, 94 S.Ct. 278, 38 L.Ed.2d 213. The Supreme Court remanded *Groner* for reconsideration in light of Miller v. California, 1973, 413 U.S. 18, 93 S.Ct. 2607, 37 L.Ed.2d 419, and its companion cases.[1] This Court rendered

1. Paris Adult Theatre I v. Slaton, 1973, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; Kaplan v. California, 1973, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492; United States v. 12 200-ft. Reels of Super 8 mm.

its decision on remand on May 24, 1974. United States v. Groner, 5 Cir. 1974, 494 F.2d 499.

[1–4] Shortly after this Court decided *Groner* on remand, the Supreme Court decided Hamling v. United States, 1974, —— U.S. ——, 94 S.Ct. 2887, 41 L.Ed.2d 590. Together, *Groner* and *Hamling* squarely reject the following arguments of the appellants: (1) that the prosecution must introduce expert testimony to enable the jury to determine the obscenity of the material in question, (2) that evidence of pandering may not be admitted into evidence to show the obscenity of the materials in question where pandering has not been charged in the indictment,[2] and (3) that mere knowledge of the character of the materials mailed, without knowledge that they are obscene, does not satisfy the constitutional and statutory requirements of scienter.

The test of obscenity governing at the time of the trial was that set forth by the plurality in Memoirs v. Massachusetts, 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1:

> ". . . three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

383 U.S. at 418, 86 S.Ct. at 977, 16 L.Ed.2d at 5–6.

[5] The appellants do not contend that the charge given by the district court was inconsistent with that definition. Rather, they contend that the United States failed to establish the obscenity of the materials in question. We have examined the record and exhibits and find that the jury could reasonably find, as it did, that the materials were obscene under the *Memoirs* standard.

[6, 7] After the appellants had been convicted, however, and while this appeal was pending, the Supreme Court decided Miller v. California, 1973, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, and its companion cases. The *Miller* reformulation of the test of obscenity provides:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

413 U.S. at 24, 93 S.Ct. at 2615, 37 L.Ed.2d at 431 (citations omitted). We find no basis for believing that the defendants would have fared better had they been tried under this standard of obscenity.[3] See Hamling v. United States, 1974, —— U.S. ——, 94 S.Ct. 2887, 41 L.Ed.2d 590, 6[illegible].

Film, 1973, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500; United States v. Orito, 1973, 413 U.S. 139, 93 S.Ct. 2673, 37 L.Ed.2d 513; Heller v. New York, 1973, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745; Roaden v. Kentucky, 1973, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757, and Alexander v. Virginia, 1973, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993.

2. The court had instructed the jury that it might consider evidence of pandering in determining whether the materials mailed were obscene. This instruction was proper under Ginzburg v. United States, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31. The appellants also argue that there was insufficient evidence of pandering to justify such an instruction. This argument deserves little discussion. The advertising material mailed by the appellants was sufficiently lurid to permit a jury to infer that it pandered to the prurient interest of recipients.

3. In general the effect of the *Miller* standard is to relax appellate review of the jury's findings. This is implicit in the court's emphasis that what "appeals to the prurient interest" and what is "patently offensive" are "essentially questions of fact", which the jurors may resolve by reference to the standards of their *local* community, rather than to "some hypothetical standard of the entire United States of America." 413 U.S. at 31, 93 S.Ct. at 2618, 37 L.Ed.2d at 434, 435. In this case, as in *Hamling*, the district court instructed the jury that it must apply a national standard. We conclude, as

[8] The appellants further contend that their conviction as to Count 6 must be reversed because there is a fatal variance between the allegations made in that count and the proof offered by the government at trial. They did not raise this objection at trial. They are barred from raising it on appeal under Rule 51, Fed.R.Crim.P., unless it constitutes "plain error". See United States v. Hyde, 5 Cir. 1971, 448 F.2d 815; Puryear v. United States, 5 Cir. 1967, 378 F.2d 29. We find that the alleged variance does not rise to the level of "plain error". We decline, therefore, to consider whether there was a variance at all, or if there was, whether it was material.

The appellants raise other points on this appeal. We have considered all of the appellants' contentions. We conclude that they do not merit discussion.

Affirmed.

the Supreme Court concluded in *Hamling*, that consideration of the record and the charge as a whole shows that there is no substantial probability that elimination of the references to a "national community" would have materially affected the jury's deliberations.

The *Miller* standard is also less stringent to the extent that it discards the "utterly without redeeming social value" test of *Memoirs* in favor of a test requiring only that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24, 93 S.Ct. at 2615, 37 L.Ed.2d at 431–432 (emphasis added).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

March 13, 1975

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, LA.
70130

TO ALL COUNSEL OF RECORD

Re: 71-2062 U.S.A. V. RATNER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be pooled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petitioner( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Arnie G. Parent
Deputy Clerk

cc: Mr. W.B. House, Jr.
Mr. Julius A. Dix
Messrs. Frank D. McCown
William F. Sanderson

SINCE 1922

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No. 74-1282

In the Supreme Court of the United States

OCTOBER TERM, 1975

SAMUEL RATNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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Petitioner contends (1) that the court of appeals erred by failing independently to determine whether the materials at issue here were obscene, (2) that in fact they were not obscene in light of materials found not to be obscene in other cases, and (3) that the government is required to introduce expert testimony on the issue of obscenity.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on seven counts charging the mailing of obscene magazines and films, and the mailing of advertisements detailing how to obtain those magazines and films, in violation of 18 U.S.C. 1461.[1] He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A6; 502 F. 2d 1300).

[1]Also convicted at the joint trial were co-defendants Albert Ratner and Wyngate and Bevins, Inc.

The evidence showed that petitioner was president of Wyngate and Bevins, Inc., a mail order house dealing in pictures, books, magazines, and films (Tr. 309, 721). Petitioner and Albert Ratner, his brother, supervised and directed the operations of the firm, which also conducted business under the name S and D Products (Tr. 308-309, 717). The company mailed thousands of advertisements, both solicited and unsolicited, throughout the United States (Tr. 247, 323-324, 334, 344, 384, 411). One of the unsolicited advertisements was addressed to a 16-year-old girl (Tr. 406-409).

Among many other items, the company advertised magazines entitled "Ups and Downs," "In Scene," and "Epic 300," and films entitled "Obscene House, Reel 1 and Reel 2." One advertisement announced "The shameless line for '69, wanton wives and permissive mates" (Tr. 944); another described one magazine as "the erotic thunder on the hard line horizon" (Tr. 937). One of the films was advertised as "Four naked female bodies writhing together in one bed" engaged in mutual oral gratification (Tr. 945-946).

The magazines that petitioner mailed were composed mainly of photographs of from one to six nude or partially nude men and/or women talking, drinking, dancing, disrobing, embracing, caressing and masturbating. The meager text dealt with homosexual and extramarital group sexual activity.

Petitioner's trial occurred prior to this Court's decision in *Miller* v. *California,* 413 U.S. 15. Thus, the *Roth-Memoirs* standard then in effect was applied.[2] *Miller* was decided while the case was pending on appeal, and the

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[2]*Roth* v. *United States,* 354 U.S. 476; *Memoirs* v. *Massachusetts,* 383 U.S. 413.

court of appeals reviewed the conviction in light of that decision, as well as *Hamling* v. *United States,* 418 U.S. 87.

1. Petitioner claims (Pet. 11-14) that the court of appeals failed to make an independent determination that the materials at issue here were obscene. But this Court has never required such an independent determination by an appellate court.[3] It has held only that juries do not have "unbridled discretion" in determining what is "patently offensive" (*Jenkins* v. *Georgia,* 418 U.S. 153, 160) and that appellate courts have "the ultimate power * * * to conduct an independent review of constitutional claims when necessary." *Miller* v. *California, supra,* 413 U.S. at 25.

The general rule in obscenity cases, as in other criminal cases, is that an appellate court will not make an independent determination of guilt or innocence but will sustain the jury's verdict of guilt if, viewing the evidence in a light most favorable to the government, there is substantial evidence to support it. See *Hamling* v. *United States, supra,* 418 U.S. at 100, 124. The court of appeals did just that in the instant case, for its opinion expressly states (Pet. App. A5):

> We have examined the record and exhibits and find that the jury could reasonably find, as it did, that the materials were obscene under the *Memoirs* standard.
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> * * * * *
>
> * * *We find no basis for believing that the defendants would have fared better had they been tried under [the *Miller*] standard of obscenity. See *Hamling* v.

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[3]Only three members of the Court have expressed the view that such an independent appellate determination must be made. See *Jenkins* v. *Georgia,* 418 U.S. 153, 163-165 (Brennan, J., concurring).

United States, 1974, [418] U.S. [87], 94 S. Ct. 2887, 41 L. Ed. 2d 590, 611.[4]

Finally the court stated in a footnote (Pet. App. A5-A6, n. 3):

> We conclude, as the Supreme Court concluded in *Hamling,* that consideration of the record and the charge as a whole shows that there is no substantial probability that elimination of the references to a "national community" would have materially affected the jury's deliberations. [See *Hamling* v. *United States, supra*, 418 U.S. at 108.]

Thus, the court of appeals in this case determined that the evidence was sufficient to support the jury's verdict under both the *Roth-Memoirs* standard and that portion of the *Miller* standard which could benefit petitioner. No more was required.

2. Petitioner next contends (Pet. 14-15) that the materials here are not obscene because similar materials have been held to be non-obscene in other cases.[5] None of the cases cited, however, involved the pandering issue presented here. Petitioner mailed thousands of advertisements proclaiming the prurience of the materials, and the jury was

[4]The court's reference to *Hamling* was to that portion of the opinion in which this Court required that any constitutional principle enunciated in *Miller* which would benefit a defendant whose case was on direct review must be applied. *Hamling* v. *United States, supra,* 418 U.S. at 102.

[5]The cases referred to are listed in the brief filed by petitioner in the court of appeals (pp. 21-25). In almost all of the cases cited, convictions were summarily reversed on the authority of *Redrup* v. *New York,* 386 U.S. 767. See, *e.g., Keney* v. *New York,* 388 U.S. 440; *Friedman* v. *New York,* 388 U.S. 441; *Bloss* v. *Dykema,* 398 U.S. 278; *Burgin* v. *South Carolina,* 404 U.S. 806.

properly instructed that evidence of pandering could be considered on the issue of obscenity (Tr. 1045). Petitioner's reliance on cases which do not allude to that factor is misplaced. For, as this Court has stated: "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." *Ginzburg* v. *United States,* 383 U.S. 463, 470. See also *Hamling* v. *United States, supra,* 418 U.S. at 130.

3. Finally, petitioner claims (Pet. 15-20) that in order to prove obscenity the government must present expert testimony.[6] However, this contention is foreclosed by *Hamling* v. *United States, supra,* 418 U.S. at 100, *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56, *Kaplan* v. *California,* 413 U.S. 115, 121-122, and *Ginzburg* v. *United States, supra,* 383 U.S. at 465, which held that expert testimony is not necessary to enable the jury to judge the obscenity of material that has been placed in evidence.

In a related contention, petitioner argues (Pet. 18-20) that his conviction must be reversed because the government failed to submit evidence that the materials here appealed to prurient interest, were patently offensive and were utterly without redeeming social value, and that the materials themselves were insufficient to prove these elements. As this Court has said, however: "The [materials], obviously, are the best evidence of what they represent. 'In the cases in which this Court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question.'" *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56

[6]No expert was offered by the government in the instant case. Instead, the obscene materials themselves were introduced in evidence. See Tr. 226, 377, 409-410, 507, 511, 514, 519.

(footnote omitted), quoting *Ginzburg* v. *United States*, *supra*, 383 U.S. at 465.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.